



P. O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • Website: www.deq.state.mt.us

MINUTES
FRIDAY – DECEMBER 6, 2002

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:08 a.m., on Friday, December 6, 2002, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Susan Kirby Brooke, David Fishbaugh, Kim Lacey (via telephone), Dr. Garon Smith, Ward Shanahan, and Russ Hudson (via telephone)

Board Members Absent: none

Board Attorneys Present: Tom Bowe and Kelly O'Sullivan, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher for Hendrickson's Court Reporting

Department Personnel Present: Jan Sensibaugh, Director; Tom Livers, Deputy Director; Lisa Peterson, Public Affairs Coordinator, Director's Office (DIR); John North, Chief Legal Counsel, Legal Unit (Legal), DIR; David Rusoff, Legal, DIR; Claudia Massman, Legal, DIR; Ed Hayes, Legal, DIR; Elois Johnson, Legal, DIR; Keith Jones, Legal, DIR; Keith Christie, Legal, DIR; Jolyn Eggart, Legal, DIR; John Arrigo, Administrator, Enforcement Division (ED); Steve Welch, Administrator, Permitting and Compliance Division (PCD); Don Vidrine, Chief, Air & Waste Management Bureau (AWMB), PCD; Dave Klemp, Air Quality Permitting Program Manager, AWMB, PCD; Charles Homer, Technical Support Section Manager, AWMB, PCD; Jan Brown, AWMB, PCD; Dan Walsh, AWMB, PCD; Debbie Skibicki, AWMB, PCD; Dave Aguirre, AWMB, PCD; Ron Lowney, AWMB, PCD; Chris Ames, AWMB, PCD; Sara Williamson, AWMB, PCD; Bonnie Lovelace, Chief, Water Protection Bureau (WPB), PCD; Tom Reid, WPB, PCD; Jon Dilliard, Chief, Community Services Bureau (CSB), PCD; Warren McCullough, Chief, Environmental Management Bureau (EMB), PCD; Pete Strazdas, EMB, PCD; Art Compton, Administrator, Planning, Prevention & Assistance Division (PPAD); Debra Wolfe, Resource Protection Bureau (RPB), PPAD; Robert Habeck, RPB, PPAD; Abe Horpestad, RPB, PPAD; Christian Levine, RPB, PPAD; J.D. Oster, DEQ Consultant

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Art Hayes, Jr., Tongue River Water Users Association (TRWU); James Bauder, Irrigators & Northern Cheyenne; Charles Hansberry, Holland & Hart LLP; Roger Muggli, T & Y Irrigation District (T&Y); Tim Lohof, TRWU; Charlie Gephart, T&Y; Rex Mongold, T&Y; Les Hirsch, TRWU; Mark Fix, NPRC & self; Clint McRae, NPRC & Rocker Six Cattle Co.; Sharon Dinstel, NPRC & self; Ray Muggli, T&Y; Julia Page, NPRC; Harmon Ranney, Montana Coal Bed Natural Gas Alliance (MCBNGA); George Nell, NPRC; Dean Johnson, WBI Holdings, Inc.; Diane Lorenzen, Air Pollution Control Advisory Council; Bruce Williams, Fidelity Exploration & Production (Fidelity); Tom Hopgood, Fidelity; Arleen Boyd, Stillwater Protective Association (SPA) & Stillwater Irrigators; Julie DalSoglio, US Environmental Protection Agency (EPA); Don Allen, Western Environmental Trade Association (WETA); Dexter Busby, Montana Refining Company; Dave Simpson, Westmoreland Coal; Jeff Briggs, Louisiana Pacific Corporation; Alan Joscelyn, Fidelity; Gail Abercrombie, Montana Petroleum Association; M.S. Kakuk, MCA [sic]; Jon Metropolis, Gough, Shanahan, Johnson & Waterman; Mr. & Mrs. Randy Foos, self; Amy Frykman, NPRC; Chris Beebe, Montana Wildlife Federation; John Hamilton, TRWU & CH Ranch; Nick Galder [sic], NPRC; Tim Chamberlin, Montana Consensus Council; Bill Courtney, Emit [sic] Technology; Dena Hoff, Buffalo Rapids Irrigators; Steve Gilbert, Montana Environmental Information Center (MEIC); Dave Searle, Marathon Oil Company

Agenda

Chairman Russell briefly explained that the order of items in Section III.B of the agenda would be altered; stating item 5 would be moved to the top of that section.

I. ADMINISTRATIVE ITEMS

A. Review and Approve Minutes

1. Review and approve minutes of September 25, 2002, CBM and agricultural tour.

Chairman Russell introduced the item and asked for comments. Hearing none, Dr. Garon Smith MOVED to APPROVE the minutes of the September 25, 2002, tour. Mr. David Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

2. Review and approve minutes of September 26-27, 2002, numeric standards rulemaking hearing.

Chairman Russell introduced the item and asked for comments. Mr. Russ Hudson asked that a specific issue he brought up at the hearing be added to the minutes. Mr. Fishbaugh MOVED to APPROVE the minutes with the amendment requested by Mr. Hudson. Ms. Susan Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

3. Review and approve minutes of September 27, 2002, meeting.

Chairman Russell introduced the item and asked for comments. Hearing none, Chairman Russell called for a motion. Dr. Smith MOVED to APPROVE the minutes. Mr. Fishbaugh SECONDED the motion. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

B. Set 2003 Meeting Schedule

After Chairman Russell introduced the item, Mr. John North, representing DEQ, explained that the Board holds six meetings per year to provide maximum flexibility for rulemaking. Mr. North further explained that the DEQ was recommending the schedule proposed in the executive summary.

Chairman Russell made known his preference on the choices for the meeting date in March. Dr. Smith affirmed that the later date in March worked better for him also. He further stated that the January 31 date worked better than the February 7 date for him.

Hearing no argument, Chairman Russell called for a motion to ACCEPT the dates of January 31, March 28, June 6, August 1, September 26, and December 5 as regular meetings of the Board of Environmental Review. Dr. Smith so MOVED. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

II. BRIEFING ITEMS

A. Contested Case Update

1. Cases Assigned to Hearing Officer Kelly O'Sullivan

a. Town of Geraldine

Ms. Kelly O'Sullivan stated she had a status conference in November and that the case is still on settlement track. She further stated that it's not moving as quickly as it had been hoped. She said the parties had asked to have until the next Board meeting to see if they could wrap it up.

2. Cases Assigned to Hearing Officer Tom Bowe

a. M&W Investments, Inc. (EQ # 01-1457 & # 00-1822)

Mr. Bowe stated he had nothing further to add to the agenda.

b. Van Dyke Construction Company, Inc. & Loughmiller Reclamation, L.L.C. (BER 2002-07 OC)

Mr. Bowe explained that settlement discussions had been underway and that he had set a January 15 goal for submittal of a settlement document.

c. Big Bend Ranch Development Company (BER 2002-08 SUB)

Mr. Bowe reaffirmed the agenda, stating there was an order for dismissal included in the action agenda items.

d. CR Kendall Corporation (BER 2002-09 MM)

Mr. Bowe declared that there was nothing he could add to the agenda.

e. Sterling Mining Company (BER 2002-01 AQ)

Mr. Bowe reaffirmed the agenda, stating the case was set for hearing on January 24, 2003.

f. Westmoreland Resources, Inc. (BER 2002-04 MSUMRA)

Mr. Bowe explained that he had a telephonic conference in the case and that settlement negotiations were ongoing. He also detailed some technical issues and stated that he would conduct another status conference in January.

g. Derek Brown Construction, Inc. (BER 2002-10 ASB)

Mr. Bowe said he had nothing further to add to the agenda regarding this case and that the case was scheduled for hearing on March 25.

h. Kwik Way, Inc. (BER 2002-00 UST)

Mr. Bowe explained that Kwik Way had initially requested a contested case hearing, but then paid the penalties. He reaffirmed that the matter would be brought up again under action items for dismissal.

3. Litigation

a. Pompey's Pillar Historical Society v. DEQ, United Harvest (MT Sup. Ct.# 02-341)

Mr. Bowe restated the verbage of the agenda.

Mr. Hudson made inquiry regarding the Van Dyke case (II.A.2.b), stating it had originally appeared that Van Dyke had done a lot of bad things. Mr. Bowe restated that the parties were working on a settlement and that he anticipated having something in writing for the Board at its next meeting.

Referring to Westmoreland Resources (II.A.2.f), Mr. Hudson pointed out that the University of Montana Forestry School had done a lot of work on reclamation of mine spoils in the area.

B. Other Briefing Items

1. Review of Agency Fees

Mr. Tom Livers, Board liaison, reiterated a previous request of the Board for overview information on the various fees that are administered by the DEQ under the authority of the Board. He explained that a fiscal spreadsheet was included in each Board member's packet and that some narrative pages were included in the supplemental packet. He then provided a brief summary of each of the fees, and gave details of when the Board last dealt with each and when they would probably be seeing them again.

Mr. Shanahan questioned the reasonableness of the solid waste management fees and how the 2003 Legislature might affect what the DEQ would need in terms of fees. He further stated the first question could not be answered until the latter was. Mr. Livers concurred that the presentation this day was just to give the Board an awareness of when they would be seeing these. He further declared that the DEQ would probably be back

before the Board after the session with more detailed information on what happened. Further discussion commenced regarding fund balances.

III. ACTION AGENDA ITEMS

A. Action on Appeals

1. Big Bend Ranch Development Company (BER 2002-08 SUB)

Mr. Bowe explained that the company had submitted additional information to the DEQ and that after reviewing the information, DEQ approved the subdivision. He further stated that the parties entered into a stipulation.

Chairman Russell called for a motion to ACCEPT the order and to AUTHORIZE the Chairman to SIGN the order. Mr. Shanahan so MOVED. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

2. Kwik Way, Inc. (BER 2002-11 UST)

Mr. Bowe explained that Kwik Way had simply decided not to pursue the contested case and had paid the penalties, therefore dismissing the case was the only thing left to do.

Mr. Shanahan MOVED to ACCEPT counsel's recommendation and to AUTHORIZE the Chairman to SIGN the order. Ms. Brooke SECONDED the motion. The motion CARRIED unanimously.

B. Repeal, Amendment or Adoption of Final Rules

Chairman Russell reiterated his earlier declaration that item 5 in this section would be moved to the beginning of the section.

5. In the matter of the proposed adoption, amendment, and repeal of rules pertaining to air quality pre-construction permits.

Mr. Bowe explained that this was the second go around for this set of rules and that he had been the presiding officer the first time around also. He referred to his presiding officer report, which pointed out that this was a complicated rulemaking, with many comments on many parts of the rules.

Mr. Charles Homer, representing the DEQ, explained what was included in the Board's packet for this agenda item and that DEQ had prepared a flip chart to assist the Board in their deliberations, since there were numerous issues involved. He further stated that the DEQ would utilize the flip chart to develop a notice to present to the Chairman for signature.

Mr. Homer described Issue No. 1 as being the purpose statement and informed the Board of their options. Discussion commenced regarding the Secretary of State's opinion of a preamble in rules and in regard to what the CAAAC group wanted.

Chairman Russell called for a motion to remove the preamble (Option 1). Ms. Brooke so MOVED. Mr. Shanahan SECONDED the motion. Discussion was held in

regard to the purpose of the preamble. Chairman Russell called for a VOTE, which resulted in a tie of 3-3. Chairman Russell exercised his voting rights to break the tie and the motion CARRIED.

Mr. Homer described Issue No. 2 as being one of the more substantive issues, having to do with construction prior to permit issuance. He then gave a narrative of the options available to the Board. Some discussion took place about some previous legislation regarding pre-permit construction involving power plants. Mr. Homer provided clarification on Option 3, in response to a request from Chairman Russell, and further discussion commenced.

Mr. Shanahan MOVED to APPROVE Option 3. Dr. Smith SECONDED the motion. After a brief discussion, Chairman Russell called for a VOTE and the motion FAILED 5-2.

Ms. Lacey MOVED to ACCEPT Option 1. Mr. Hudson SECONDED the motion. The motion CARRIED in a 6-1 VOTE.

Mr. Homer explained that Issue No. 3 had to do with the exemption of emergency equipment from permitting. He then described the Board's options. Mr. Homer provided example scenarios where this issue could be involved and how the different options might affect it.

Chairman Russell called for a motion to ACCEPT Option 1. Ms. Brooke so MOVED. Ms. Lacey SECONDED the motion. A VOTE was taken, but the outcome was unclear. Chairman Russell asked for a roll call on the vote, which resulted in a tie of 3-3. Chairman Russell broke the tie, voting in favor of the motion, and the motion CARRIED.

Mr. Homer stated Issue No. 4 was regarding an exemption from permitting for drilling rigs. He then gave details of the options before the Board. Dr. Smith made inquiries regarding the issue, to which Mr. Homer responded. Mr. David Klemp, representing the DEQ, provided a more detailed response to a question concerning the proportion of time a specific rig might be in operation.

Mr. Shanahan MOVED to ACCEPT Option 1. Ms. Lacey SECONDED the motion. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Mr. Homer explained that Issue No. 5 was based on comments from the EPA. He further said the comments were the ones the EPA had made on the de minimis rule when it was initially heard by the Board. Mr. Homer explained the four major areas involved. He then described the three options available to the Board.

Chairman Russell called for a motion to ACCEPT Option 1. Mr. Fishbaugh so MOVED. Ms. Brooke SECONDED the motion. Mr. Hudson inquired about the DEQ's preferred option. After a satisfactory response from Mr. Homer, Chairman Russell called for a vote and the motion CARRIED 5-2.

Mr. Homer described Issue No. 6 as being a comment about the term "shakedown procedures" not being defined, but also stated that the commenter did not suggest any

language to define the term. Mr. Homer said it had different meanings for different facilities and explained the use of the term.

Ms. Lacey MOVED to ACCEPT Option 1. Ms. Brooke SECONDED the motion. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Mr. Homer explained that Issue No. 7 involved consideration of past compliance and gave details of the options being presented to the Board.

Mr. Shanahan MOVED to accept Option 1. Ms. Brooke SECONDED the motion. The motion CARRIED with a 6-1 VOTE.

Issue No. 8 was described as having to do with the public comment period associated with air quality permitting. Mr. Homer then provided details of the options before the Board. Discussion commenced regarding the impact of this issue to the process. Mr. Homer provided detailed information on the statutory timeframe for issuing an air quality permit. A lengthy discussion took place regarding the whole air quality permitting process.

Chairman Russell, believing it had been moved and seconded to accept Option 1, called for a VOTE. The vote was unanimous for the motion.

Mr. Homer explained that the next few issues all kind of had the same basis. He said on Issue No. 9 there was a difference on the use of the terms “shall” and “may” in the definition of BACT. Mr. Homer gave a little more detail of the issue and the options.

Mr. Shanahan MOVED to ACCEPT Option 1. Ms. Brooke SECONDED the motion. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Mr. Livers informed the Chairman that there had not been a motion on the floor for Issue No. 8 when he called for the vote. Ms. Brooke MOVED to ACCEPT Option 1 on Issue No. 8. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Homer said Issue No. 10 had to do with the definition of “construct” or “construction.”

Chairman Russell called for a motion to ACCEPT Option 1. Mr. Hudson so MOVED. Dr. Smith SECONDED the motion. The motion CARRIED with a 6-1 VOTE.

Mr. Homer said Issue No. 11 had to do with the definition of “facility.” He explained the options being presented to the Board. Mr. Homer provided further clarification on the issue and options in response to questions from Board members.

Dr. Smith MOVED to ACCEPT Option 1. Mr. Fishbaugh SECONDED the motion. With a 5-2 VOTE, the motion CARRIED.

Issue No. 12 was described by Mr. Homer as having to do with the adoption of a definition of routine maintenance, repair or replacement.

Mr. Shanahan MOVED to ACCEPT Option 2. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

In regard to Issue No. 10, Mr. Homer asked for clarity from the Board on their actual intention. Chairman Russell explained that it was the only one they had acted differently on.

Mr. Shanahan made a SUBSTITUTE MOTION to ACCEPT Option 2 on Issue No. 10. Mr. Fishbaugh SECONDED the motion. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Mr. Homer referred to Issue No. 13 as the portable facility permitting threshold and explained the options before the Board. Discussion commenced as Mr. Homer responded to questions from the Board regarding the specifics of the issue and the options available.

Mr. Shanahan MOVED to ACCEPT Option 1. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Homer said Issue No. 14 had to do with the general exclusion from permitting for emergency equipment. A brief discussion took place regarding the options.

Chairman Russell called for a motion to ACCEPT Option 2. Mr. Fishbaugh so MOVED. Dr. Smith SECONDED the motion. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Mr. Homer said Issue No. 15 concerned effective dates for conditions and expiration dates for permits. He then explained the options being made available to the Board.

Mr. Shanahan MOVED to ACCEPT Option 2. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Issue No. 16 was described by Mr. Homer as being more substantive, having to do with the ability of the DEQ to place state-only conditions in the permits. He explained the options available in detail. In response to Board questions, Mr. Homer provided a specific example of a state-only condition.

Chairman Russell called for a motion to ACCEPT Option 1. Mr. Shanahan so MOVED. Mr. Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

Mr. Homer described Issue No. 17 as concerning a provision that the DEQ may revoke a provision of a permit without revoking the entire permit. He then explained the options being presented to the Board.

Mr. Shanahan MOVED to ACCEPT Option 2. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Homer provided details of Issue No. 18, stating it had to do with public review requirements for administrative amendments to permits. He described the three options available to the Board.

Mr. Shanahan MOVED to ACCEPT Option 3. Ms. Brooke SECONDED the motion. Hearing no further comments or questions, Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Mr. Homer said Issue No. 19 dealt with the permit transfer of location and detailed the two options presented.

Mr. Shanahan MOVED to ACCEPT Option 2. Ms. Brooke SECONDED the motion. The VOTE was unanimous and the motion CARRIED.

Mr. Homer explained that Issue No. 20 consisted of editorial changes, mostly corrections to internal references. He also said that the references would change based on the action taken on Issue No. 1. Mr. Homer concurred with Mr. Fishbaugh's statement regarding it not being necessary for the Board to make a motion on this issue.

Mr. Homer explained that while the initial comments and issues included only 20 issues, a separate page for Issue No. 21 had been sent out a couple of days prior. He said Issue No. 21 had to do with the permit revocation language and he described the options being presented to the Board.

Ms. Brooke MOVED to ACCEPT Option 1. Mr. Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

Discussion continued regarding the rule notice and how it would be put back together. Mr. Bowe suggested a cleanup motion. Mr. Homer said the notice could be ready for review the next week and that it would be possible to take final action at the January 31 meeting.

As stated by Chairman Russell, Dr. Smith MOVED to incorporate the 20 options voted on, ACCEPT the Hearing Officer's report and the 521 and 311 analysis, and to authorize the Board to SIGN outside the regular Board meeting. Mr. Bowe clarified that the intention of the Board was to ADOPT the new rules and the amendments and repeals as proposed, with the decisions the Board had made on the 20 issues. Mr. Shanahan SECONDED the motion. Hearing no further discussion, Chairman Russell called for a VOTE and the motion CARRIED unanimously.

1. In the matter of the amendment of ARM 17.8.302(f) pertaining to air quality incorporation by reference rules.

Mr. Bowe explained that Ms. Kelly O'Sullivan had been the presiding officer at the hearing. Ms. O'Sullivan said this was a routine and non-controversial rulemaking, stating there had been no comments received. She further informed the Board that the DEQ was recommending adoption of the proposed rule with the amendments.

Mr. Shanahan MOVED to ADOPT the recommendation. Ms. Brooke SECONDED the motion. Chairman Russell stated it had been moved and seconded to accept the Presiding Officer's comments, to amend the rule, and to accept the 521 and 311 analysis. He called for a VOTE and the motion CARRIED unanimously.

2. In the matter of the amendment of ARM 17, Chapter 8, Subchapter 6 pertaining to certain air quality open burning rules.

Ms. O'Sullivan confirmed that she had been the Presiding Officer and explained that this was relatively routine and non-controversial. She said only one comment was received; it was from the EPA. She said the DEQ had responded to the comment and had made changes to the rule. Ms. O'Sullivan declared that the DEQ was recommending adoption of the proposed rules as amended.

Chairman Russell called for a motion to ADOPT the amendments to the rule, and to ACCEPT the Hearing Officer's report and the 521 and 311 analysis. Mr. Fishbaugh so MOVED. Mr. Shanahan SECONDED the motion. Hearing no further comment, Chairman Russell called for a VOTE and the motion CARRIED unanimously.

3. In the matter of the amendment of rules pertaining to the Metal Mine Reclamation Act.

Ms. O'Sullivan affirmed that this rulemaking was controversial, stating there had been extensive public comment. She said the DEQ had responded to the comments received and that a corrected sheet had been provided to those Board members who were present. Mr. Pete Strazdas, representing the DEQ, explained the three corrections in detail.

Mr. Shanahan MOVED to ACCEPT the DEQ's recommendation with the replacement sheets and the amendments. Chairman Russell clarified the motion to be adopting the Hearing Officer's report, the public comments, and the 521 and 311 analysis. Ms. Brooke SECONDED the motion for discussion purposes.

Ms. O'Sullivan offered to point out the most controversial aspects of the rulemaking, and some of the comments and what the DEQ did in response to those comments. She said one of the first issues was the collateral bond and she provided details of the comments received and how the DEQ responded. Another issue concerned removal of the buildings. She provided details of the comments and how the DEQ responded.

Ms. O'Sullivan described another controversial issue as being the most recent bond calculation language in 17.24.117. She said the DEQ had clarified the language.

Ms. O'Sullivan said that the additional 30-day comment period drew a lot of comment, and that the DEQ had deleted the language. She said there were other less controversial comments, which the DEQ had responded to.

Chairman Russell reminded the Board of the motion on the floor and called for a VOTE. The motion CARRIED unanimously.

4. In the matter of the proposed amendment, adoption and repeal of rules pertaining to the protection of visibility in mandatory Class I federal areas (national parks and wilderness areas).

Mr. Bowe confirmed he had been the presiding officer. He said he recommends that New Rule II not be adopted because he thought it conflicted with federal law. He also said that the EPA, National Park Service, and Fish and Wildlife Service agreed with him and that their letters were included in the packet.

On behalf of the DEQ, Debra Wolfe provided lengthy testimony in defense of New Rule II, but also stated that it didn't really matter which way the Board chose to go on this.

After further discussion, Mr. Hudson MOVED that the Board refuse to amend, repeal, or adopt the proposed rules in their entirety. Ms. Brooke SECONDED the motion. Chairman Russell provided clarification that the motion was to take NO FURTHER ACTION to amend the rules. He called for a VOTE and the motion CARRIED unanimously.

Chairman Russell explained how the rest of the agenda would flow, stating the Board would first address the last three agenda items, then return to III.B.6.

C. Initiation of Rulemaking and Appointment of Hearing Officer

1. Update the Air Quality Incorporation By Reference Rules

Mr. Homer explained that this rulemaking would change the volume of the CFR that's incorporated by reference, from the 2001 volume to the 2002 volume.

Mr. Shanahan MOVED to ADOPT the recommendation. Chairman Russell said it had been moved to INITIATE rulemaking. Ms. Brooke SECONDED the motion. Chairman Russell called for a vote, then apologized because he had not given the Board a chance to comment.

Mr. Homer informed the Board that a tentative hearing date was scheduled. Mr. Bowe stated the tentative hearing date was January 29, 2003, and confirmed that he was available to preside over the hearing.

Chairman Russell reminded the Board that they had not voted yet, and called for a VOTE to INITIATE rulemaking and to APPOINT Mr. Bowe as the hearing examiner. The motion CARRIED unanimously.

D. New Contested Cases

1. Classical Gas, BER 2002-12 UST

Mr. Bowe updated the Board on the case, stating that the hearing date proposed in the schedule conflicts with his schedule, but that Ms. O'Sullivan was available to serve as the hearing examiner for this case.

Mr. Shanahan MOVED to APPOINT Ms. O'Sullivan as the hearing examiner. Ms. Lacey SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

E. Other Action Items

1. Express Pipeline

Chairman Russell stated that this item was the release of the bond that the DEQ recommends on that pipeline. Mr. North provided background information on the bonds, stating that the Board had required two bonds in 1996 when the certificate for the Express Pipeline was issued. He said that the DEQ was requesting approval of two partial bond releases because the Express Pipeline Company had done a lot of work. Mr. North said the DEQ was not recommending complete bond release because there were still some vegetation issues on approximately 13 miles of the pipeline and some issues remained on the construction bond.

Mr. North explained that an error had been found in the calculation for the reclamation bond, so the DEQ was upping the amount of the release to \$242,037. He further stated that counsel for Express had indicated that they favor the release, but that they were not waiving their right to claim additional bond release in the future.

Mr. Alan Joscelyn, counsel for Express, said the company's position was actually that they were probably entitled to have significantly more released, but that they didn't want to make an issue of it at this point.

Discussion commenced regarding the private landowners whose property the pipeline runs under. Mr. North indicated that one of the complaining landowners was present in the room. Mr. Fishbaugh asked if the landowner would like to speak and Chairman Russell opened the floor to the landowner.

Mr. Randy Foos stated that the pipeline had forced its way through their farm, brought up a bunch of rocks, left them, and now there was water flowing along the pipeline. He provided further details of the problem, stating that Express had refused to pay for any crop damages.

Mr. North said that the bond does not cover crop damage, but that it would cover any necessary rehabilitation of the land. Mr. Shanahan asked if the DEQ believed that, from what Mr. Foos described, would that be included in the bond. Mr. North concurred.

Mr. Tom Ring indicated that the DEQ had attempted on several occasions to get the landowner and Express to work together. Chairman Russell inquired as to the Board's authority to execute the bond. Mr. Ring confirmed that the Board had such authority.

Mr. Joscelyn provided more detail on the situation, stating that Mr. Foos had filed a civil litigation against Express, and that the litigation was pending.

Further discussion took place regarding the uniqueness of the circumstances on this particular property. Mr. Ring explained how the proposed retention portion of the bond was calculated. He engaged in further discussion regarding a drainfield that might be proposed to address the problem.

Chairman Russell called for a motion to release \$176,337 of the construction bond, and \$242,037 of the reclamation bond. Mr. Hudson so MOVED. Mr. Shanahan

SECONDED the motion. A brief discussion took place. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

B.6. In the matter of numeric water quality standards.

Mr. Tim Chamberlain, facilitator with the Montana Consensus Council, said he had prepared a short summary of what occurred during the collaborative. He indicated he believed the group had a substantial positive outcome. He said the process led the participants to examine their goals and interests, examine technical data and expert opinion, and to document the critical matters that were before them. Mr. Chamberlain informed the Board that complete agreement had not been reached, but that progress continues to be made.

On behalf of the DEQ, Mr. Art Compton, responding to a question from Mr. Hudson, provided a quick update on the TMDL process. He said that the DEQ had just come out with a status report on the TMDL effort. Mr. Compton also indicated that the DEQ was ready to adopt, or at least identify, TMDL targets as soon as the Board acts on this rulemaking. He said that the DEQ would then complete the TMDL process. Discussion took place regarding Wyoming's involvement.

Mr. Compton handed out a summary of where the collaborative currently was, reiterating that more work had been done since the last collaborative meeting with Mr. Chamberlain. He stated that industry had indicated they could support the concept of numeric standards with a couple of provisions: the number one issue concerned the DEQ's nondeg approach, and another had to do with the concept of flow-based review. Mr. Compton held further discussion on the issues and provided examples of flow base. He touched on a recent Federal District Court decision that a permit is not required for CBM water, and continued with discussion on the subject. Mr. North held discussion on the review protocol and stated that the DEQ had reached a rough agreement with industry on how the process would look.

In response to Board inquiries, Mr. Compton provided clarification on the whole flow base issue. Discussion continued with further information on the supplemental rulemaking package that the DEQ indicated would be presented to the Board at the March or May 2003 meeting.

Mr. Compton confirmed that the DEQ was still communicating with both industry and the Petitioners on a weekly, and sometimes daily basis.

Mr. North responded to questions from the Board concerning severability. Mr. Bowe added to the discussion. A more in-depth discussion occurred concerning the wide range of numbers being thrown around. Mr. Compton said he thought everyone used a lot of the same sources in coming up with their numbers, and that the differences perhaps were different levels of risk. For example purposes, Mr. Compton described how the DEQ came up with their numbers. Dr. Smith requested that the Board be given something that would be justification for where the rule came from, a sort of rationale with some references. Mr. Compton stated that the information already exists, and that

the DEQ could compile the information into a “step-by-step rational sort of logical thought process.”

Mr. Shanahan stated that while on his tour in Wyoming, he learned that Wyoming has a narrative standard as the principle, but that they assign a number on a permit-by-permit basis. He asked why Montana was doing something different and discussion began on the issue.

Ms. Lacey initiated discussion regarding the upcoming irrigation season and whether something would be in place by then. In-depth discussion took place concerning the Northern Cheyenne Tribe’s proposed standards and how the EPA might respond to them.

Mr. Compton provided an update on the EIS process, stating that the final EIS was scheduled to come out in January 2003. Discussion was held regarding the timeline for the Record of Decision on the EIS.

Mr. Roger Muggli spoke in support of moving ahead with the irrigator’s petition, stating that there was no good reason to delay it any longer. Mr. Muggli clarified that he was referring to the proposed compromise rule, not the original irrigator’s petition.

Mr. Hudson MOVED to ACT on the compromise irrigator’s rule for the sake of discussion. Ms. Lacey SECONDED the motion for discussion purposes. Discussion took place in regard to the process of implementation, flow base, 7Q10, and the nondeg issue.

Chairman Russell indicated that through this entire process he had been inquiring as to whether the proposed standards would protect the irrigators.

Mr. Compton stated that the DEQ was committed to returning before the Board in January with a request to initiate supplemental rulemaking.

Ms. Brooke reminded the Board that there was a motion on the floor. After a brief discussion, Chairman Russell called for a VOTE on the motion to ACCEPT the irrigator’s compromise proposal. The motion FAILED 6-1.

Mr. Shanahan MOVED to ACCEPT the DEQ’s recommendation. Chairman Russell said that the DEQ’s recommendation was that the Board delay adoption or rejection of the new rules until the DEQ initiates supplemental rulemaking at the next meeting.

Mr. Compton clarified that the DEQ would bring a numeric standard that had been proposed. Discussion took place regarding filing dates, since the Board indicated they would like the process expedited. The option of a teleconference to initiate the supplemental rulemaking was also explored.

Mr. Shanahan cleaned up his motion to include an expedited schedule of a teleconference to initiate the rulemaking and to hold the public hearing at the January 31 meeting. Mr. Fishbaugh SECONDED the motion. Discussion took place regarding a water quality law, and it was determined that the requirement of that law had been

satisfied. It was further determined that it would be filed on December 16, and therefore the teleconference would take place on Friday, December 13, at 2:00 p.m. Ms. Lacey SECONDED the motion. Discussion continued to address materials the Board wished to see prior to the teleconference. A VOTE was taken and the motion CARRIED unanimously.

Mr. Hudson requested that the Board Secretary be directed to inform everyone who conducts business with the Board to have all their documentation to her at least five days prior to the Board meeting. Chairman Russell concurred.

IV. ADJOURNMENT

Chairman Russell called for a motion to ADJOURN. Ms. Brooke so MOVED. Mr. Fishbaugh SECONDED the motion. Chairman Russell announced that the Board was adjourned. The meeting adjourned at 2:35 p.m.

Board of Environmental Review December 6, 2002, Minutes Approved:

JAN P. SENSIBAUGH
DIRECTOR
DEPARTMENT OF ENVIRONMENTAL
QUALITY

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL
REVIEW

DATE

DATE